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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN,
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JUNE 10, 2002

QUESTIONS PRESENTED

1. Whether, under the constitutional principle of one-person, one-vote, a State must justify a population deviation of only 0.003% (19 persons) in a congressional redistricting statute.

2. Whether plaintiffs challenging a congressional redistricting statute meet their burden of proof, to show that population differences among districts could have been reduced by a good-faith effort to draw districts of equal population, merely by proffering an abstract zero-deviation map that had neither been put before the state legislature nor drawn to incorporate the legitimate polices of the legislature that are implicit in the enacted plan.

3. Whether a population deviation of 0.003% in a congressional redistricting plan is justified, when the legislature rejected competing plans with larger deviations, when the enacted plan gives each major party an equal number of districts in which it enjoys a majority of registered voters, protects the senior member of the state's congressional delegation, maintains majority-minority districts and creates an open seat in an area of population growth and when eliminating the deviation in the enacted plan would increase the number of split voting precincts that burden local election officials.

4. Whether a three-judge court, after holding a congressional redistricting statute unconstitutional, may issue a mandatory injunction to the state legislature, directing it to enact a new congressional redistricting plan and to submit the new statute to the court for federal judicial review and approval.

PARTIES

The parties to this appeal are the Presiding Officers of the Pennsylvania General Assembly, Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania (Appellants herein and Defendants below), and Richard & Norma Jean Vieth and Susan Furey (Appellees herein and Plaintiffs below).[1]

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[1] The Governor of Pennsylvania Mark Schweiker, then-Secretary of the Commonwealth Kim Pizzingrilli and the Commissioner of the Bureau of Commissions, Elections and Legislation Richard Filling ("Executive Officers") were also named defendants below. Executive Officers have also filed an appeal from the April 8, 2002 order of the three-judge court.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

INTRODUCTION

On April 11, 2002, Appellants filed a Notice of Appeal to this Court under 28 U.S.C. §1253 from the opinion and order of the three-judge court entered April 8, 2002 in Civil No. 1:CV-01-2439 (U.S. District Court for the Middle District of Pennsylvania) (Nygaard, C.J., Rambo & Yohn, D.J.). A copy of the Notice of Appeal appears in the Appendix ("App.") at 1a-2a.

The three-judge court declared a Pennsylvania statute, Act No. 2002-1 ("Act 1"), unconstitutional under

U.S. CONST. art. I, §2 (the principle of one-person, one-vote) and enjoined its implementation by defendants. In Act 1 the Pennsylvania General Assembly established the boundaries of the 19 congressional districts apportioned to Pennsylvania under the 2000 Census. This Jurisdictional Statement, submitted pursuant to Supreme Court Rule 18.3, supports this Court's jurisdiction and shows that this appeal presents substantial and important questions on which this Court should exercise plenary review and allow full briefing and oral argument.

OPINIONS BELOW

The April 8, 2002 majority opinion and order and the dissenting opinion of Judge Yohn are reported at 195 F. Supp.2d 672 and are available electronically at 2002 U.S. Dist. LEXIS 6188 and 2002 WL 530870. *See* App. at 3a-15a (*per curiam* opinion), 16a-17a (order) and 18a-22a (dissenting opinion). Citations herein are to 195 F.Supp.2d and to the Appendix.

JURISDICTION

Appellate jurisdiction to review the opinion and order below is provided by 28 U.S.C. §1253, which states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and a hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The three-judge court was convened pursuant to 28 U.S.C. §2284(a), which provides: "A district court of three

judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" The majority opinion and order below declared Act 1 (which embodied a congressional redistricting plan) unconstitutional, permanently enjoined its implementation and contained a mandatory injunction compelling the state legislature to make new law and to submit such enactment to the court for federal judicial review and approval. The present appeal thus fits squarely within Section 1253 and probable jurisdiction should be noted. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (Supreme Court "jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction"); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (entertaining appeal pursuant to Section 1253 from order enjoining use of state legislative redistricting plan); *Hunt v. Cromartie*, 532 U.S. 234 (2001) (entertaining appeal pursuant to Section 1253 from order enjoining use of congressional redistricting plan pursuant to Section 1253); *see also White v. Register*, 412 U.S. 755 (1973) (where three-judge court grants both declaratory relief *and* injunctive relief, Court can review both under Section 1253).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. art. I, §2, cl. 1 provides in pertinent part, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States ... ." U.S. CONST. art. I, §4, cl. 1 provides in pertinent part, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ... ."

STATEMENT OF THE CASE

A. Factual Background

Under the 2000 Census, Pennsylvania's total population was 12,281,054, making the "ideal" population for each of Pennsylvania's 19 congressional districts 646,371 or 646,372. Pennsylvania lost 2 seats in Congress (going from 21 to 19) as a result of reapportionment following the 2000 Census. The loss of 2 seats in conjunction with population growth made it necessary to increase the size of congressional districts in Pennsylvania by approximately 100,000 persons. Moreover, during the last decade, Pennsylvania experienced significant population shifts, in particular, decreased population in the large urban centers (Pittsburgh and Philadelphia), yet significant growth in the Philadelphia suburbs, in the counties of the Poconos region and in southcentral Pennsylvania. As a result, in 2002, substantial changes were required in congressional districts in order to comply with the one-person, one-vote principle.

Act 1 became law on January 7, 2002. Based on the 2000 Census data, of the 19 congressional districts Act 1 established, the largest congressional district was only 9 persons over, and the smallest district was only 10 persons under, the ideal population. This 19-person difference between the largest and smallest districts calculates to a total population deviation of 0.003%. The General Assembly rejected competing plans that had higher deviations, including one that closely resembled the enacted plan but that had a deviation of 24 persons. No proposed plan was put before the General Assembly for its consideration that had a lower population deviation than the enacted plan.

The congressional redistricting plan contained within Act 1 embodied a number of compromises between the Pennsylvania House and Senate on legitimate political and legislative goals. The redistricting plan established by Act 1 maintained majority-minority districts for two seats in Philadelphia, protected the most senior member of the State congressional delegation (Congressman John Murtha), created an open seat acknowledging the population growth in the southeast part of the state, and paired the residences of four incumbents who had not announced previously an intent to retire (Democrat Congressmen Borski & Hoeffel in new District 13 and Republican Congressman Gekas & Democrat Congressman Holden in new District 17). These goals, as well as the General Assembly's efforts to reduce the total population deviation among districts, were reflected in the legislative debates on the bill (SB 1200) that became Act 1.

B. Procedural History

On January 11, 2002, Plaintiffs filed an Amended Complaint[2] for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania against Presiding Officers, Executive Officers and the Commonwealth. App. at 25a-45a. Plaintiffs alleged that Act 1, *inter alia*, denied or abridged their right to vote for their Representative to the United States Congress, in violation of U.S. CONST. art. I, §§2 and 4 and amend. XIV, §2.[3] The three-judge court was

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[2] The initial complaint, filed December 27, 2001, challenged the 1992 congressional districting plan as unconstitutional in light of the 2000 Census data.

[3] Plaintiffs also alleged that Act 1 denied them equal protection of the laws, constituted an abridgment of the privileges and immunities of citizenship, and denied or abridged

convened to entertain the challenge, and on March 11-12, 2002, heard evidence from the parties. Each side then filed proposed findings of fact and conclusions of law.

C. The Decision Below

In the majority opinion issued April 8, 2002, Judges Nygaard and Rambo declared Act 1 unconstitutional under the principle of one-person, one-vote and enjoined its implementation by Defendants.[4] Judge Yohn dissented.

Attempting to follow the framework set forth in *Karcher v. Daggett*, 462 U.S. 725 (1983), for one-person, one-vote challenges, the court found that Plaintiffs had sustained their burden to show that "the differences in district-to-district population could have been reduced or eliminated altogether by a 'good-faith effort to draw districts of equal population.'" 195 F.Supp.2d at 675 (quoting *Karcher*, 462 U.S. at 730); App. at 7a. To support this conclusion, the court relied upon a map ("Alternative Plan 4") submitted by Plaintiffs, which was alleged to achieve "zero deviation without splitting any precincts among congressional districts and split[ting] fewer

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their right to free association as guaranteed by amend I. *See* Amended Complaint; App. at 41a-43a. On February 22, 2002, the three-judge court dismissed these claims, leaving only the one-person, one-vote claim. App. at 23a-24a. The court also dismissed the Commonwealth as a defendant on all counts. *Id.*

[4] Following the invalidation of Act 1, on April 17, 2002, the Pennsylvania General Assembly passed a bill containing a revised congressional redistricting plan. On April 18, 2002, the Governor signed the bill into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle, but will be superseded by Act 34 for the 2004 congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order.

municipalities than Act 1." *Id.*; App. at 7a. In footnote 3, the court rejected the Defendants' contention that Alternative Plan 4 could not be considered for the purpose of satisfying the first prong of *Karcher*:

> [Defendants] argue that Plaintiffs must meet their burden under the first prong of the *Karcher* test only by relying on maps and/or redistricting plans that have a lower population deviation than the one enacted *and* that were presented to the legislature. We disagree. Although in *Karcher*, the legislature had before it other plans with less deviation, the [Supreme] Court never endorsed such a requirement. Instead, the Court focused on whether a plan with less deviation was possible. ... If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis.

Id. at 275-76 n.3 (emphasis original); App. at 8a.[5]

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[5] Defendants' position was and is slightly, but materially, different than the court's statement of the issue. Defendants argued that plaintiffs could only meet their burden by proffering a redistricting map with lower deviation that had *either* been put before the legislature *or* that tracked the legitimate objectives of the legislature as represented by the enacted plan. Defendants contended that relying on an abstract, hypothetical zero-deviation plan would reduce the *Karcher* test to a mere exercise in long division.

The court also rejected Defendants' argument that the total deviation of 19 persons (0.003%) was too small to rise to a constitutionally significant level. Relying on *Karcher*, the court concluded that "the population deviation in Act 1, even though relatively small, enables the Plaintiffs to satisfy *Karcher*'s first prong and shifts to the Defendants the burden of proving justification." *Id.* at 676; App. at 10a. Judge Yohn agreed with this portion of the majority opinion. *Id.* at 679; App. at 18a.

While acknowledging that the "burden borne by the State [under prong two of the *Karcher* test] varies inversely with the magnitude of the population deviation," *Id.* at 677 (citing *Karcher*, 462 U.S. at 741); App. at 11a, the court went on to reject, as a "pretext," Defendants' contention that the legitimate state interest in avoiding split voting precincts justified a total population deviation of 19 persons (0.003%) from the ideal. *Id.*; App. at 12a. The court also declined to acknowledge the other state interests identified by Defendants as justification for the population deviation in Act 1, explaining that "since the focus of our inquiry in the justification phase is population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits." *Id.* at 677 n.4; App. at 11a. The court concluded that "Defendants have failed to provide any legitimate justification for the population deviations contained in Act 1." *Id.* at 678; App. at 14a. Judge Yohn disagreed with this portion of the majority opinion. *Id.* at 679; App. at 18a; *see also infra.*

Having found the Act 1 plan unconstitutional, the court enjoined its implementation. *Id.* at 679; App. at 16a-17a. Noting the "primary jurisdiction" of the State legislature over congressional redistricting and the lack of record evidence even suggesting that the General Assembly

would be unable to enact a new redistricting plan in time for the 2002 elections, the court ordered: "The Pennsylvania General Assembly shall, within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." *Id.* at 678, 679; App. at 14a-15a, 17a. Judge Yohn, although dissenting from the ultimate finding of unconstitutionality, agreed that if the Act 1 plan was unconstitutional, allowing the legislature a reasonable opportunity to correct any deficiency was appropriate. *Id.* at 679; App. at 18a.

In his dissent, Judge Yohn concluded that defendants had met their minimal burden to justify the miniscule population deviation. *Id.*; App. at 18a. Judge Yohn determined that the evidence supported Defendants' justification that the deviation was attributable to a desire to avoid split precincts. *Id.* at 680; App at 20a. In addition, Judge Yohn explained why the majority was wrong to rely on Plaintiffs' Alternative Plan 4 to shift the burden:

> Plaintiffs produced a map that was 'zeroed out' without splitting any voting precincts, Alternative Four. However, this plan does not follow the general contours of Act 1. The [Supreme] Court has oftentimes reminded us of the necessity not to override state goals, policies and preferences any more than is necessary. There is no evidence to support a conclusion that Alternative Four encompasses the many other state goals, policies and preferences inherent in Act 1 which resulted in its enactment.

Id. at 680-81; App. at 21a-22a (internal citations omitted). Judge Yohn would have upheld Act 1.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial and important questions concerning the validity and application of the legal standards used to assess alleged violations of the one-person, one-vote principle and the authority of a federal court to order a state legislature to enact law and to assume a power of review and approval over such law.

A. *De Minimis* Deviation

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court held the principle of one-person, one-vote applicable to congressional reapportionment pursuant to U.S. CONST. art. I, §2 and established a standard requiring that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 8.

In elucidating the *Wesberry* standard in *Kirkpatrick v. Priesler*, 394 U.S. 526, 530 (1969), this Court declined to establish a "fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard." Instead, it explained that "the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance no matter how small." *Id.* at 530-31 (citation omitted). Justice Fortas wrote separately to emphasize his disapproval of the "standard of near perfection" announced in *Kirkpatrick*, predicting that "[t]o carry out this theoretical possibility [] a legislature might have to ignore the boundaries of common sense" and noting that "[n]o purpose is served by an insistence on precision which is unattainable because of the inherent

imprecisions in the population data on which districting must be based." *Id.* at 538, 539 (Fortas, J., concurring).

Thirteen years later in *Karcher*, this Court revisited the issue of *de minimis* deviation when it addressed the question of "whether an apportionment plan for congressional districts satisfies Art. I, §2, of the Constitution without need for further justification if the population of the largest district is less than one percent greater than the population of the smallest district." 462 U.S. at 727. The challenged congressional redistricting plan had a total population deviation of 0.6984%. This Court again declined to establish a *de minimis* threshold. *See id.* at 733-34.

However, Justice White (joined by Chief Justice Burger, Justice Powell and then-Justice Rehnquist) dissented, refusing to approve "the Court's unreasonable insistence on an unattainable perfection in the equalizing of congressional districts." 462 U.S. at 766 (White, J., dissenting). The dissenting Justices stressed that "[o]ne must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes 'fair and effective representation'" and urged that *Wesberry* be understood in light of the malapportionment existing in the States at the time. *Id.* They identified the effect of the Court's standard, noting that the absence of a *de minimis* threshold only "invites further litigation of virtually every congressional redistricting plan in the Nation," because "[w]ith the assistance of computers, there will generally be a plan with an even more minimal deviation from the mathematical ideal." *Id.* at 772-73. They also highlighted the tension between the burden borne by a state legislature under the majority's standard and prior precedent respecting the realities of the legislative process and promoting deference to legitimate state goals:

> The only way a legislature or bipartisan commission can hope to avoid litigation will be to dismiss all other legitimate concerns and opt automatically for the districting plan with the smallest deviation. ... No effort is expended [by the majority] to show that Art. I, §2's requirement that Congressman be elected 'by the people' demands the invalidation of population deviations at this level. Any such absolute requirement, if it did exist, would be irreconcilable with the Court's recognition of certain justifications for population variances. Given no express constitutional basis for the Court's holding, and no showing that the objectives of fair representation are compromised by these minimal disparities, the normal course would be to uphold the actions of the legislature in fulfilling its constitutionally delegated responsibility to prescribe the manner of holding elections for Senators and Representatives. Art. I, §4. Doing so would be in keeping with the Court's oft-expressed recognition that apportionment is primarily a matter for legislative judgment.

Id. at 774-75. The dissenters predicted that the majority-approved "sterile and mechanistic application," of the standard will "only bring[] the principle of one-person, one-vote into disrepute." *Id.* at 774.

This case is a prime example of the potential for "disrepute" that a sterile and mechanistic application engenders. Here, the three-judge court invalidated a congressional redistricting plan with a total deviation of 19 persons or 0.003%. Relying on precedent of this Court, the court refused to recognize a *de minimis* threshold for which a State need not justify the deviation. This Court, however,

has never ruled on a statistical deviation essentially indistinguishable from zero. Even in *Karcher*, where the four dissenters chastised the majority, the total deviation was 3,674 persons or 0.6984%. *See* 462 U.S. at 728. This appeal presents the Court with the opportunity to address whether a State must justify a population deviation of 0.003% and to clarify the legal standard applicable to alleged violations of the one-person, one-vote principle as it coexists with the Court's long-standing recognition that congressional redistricting is inherently a political process. *See e.g., White v. Weiser*, 412 U.S. 783 (1973); *Upham v. Seamon*, 456 U.S. 37 (1982).

Even if this Court were disinclined to modify the *Karcher* standard, it must be recognized that the decision of the three-judge court below essentially does so. In *Karcher*, this Court held that minor population deviations can be justified on a minimal showing. *See* 462 U.S. at 741. The acceptance by the court below of an abstract zero-deviation plan and its rejection of the Defendants' proffered justifications in light of that plan ensures that it will be practically impossible for any plan to pass constitutional muster unless absolute "zero" deviation is attained. The *Karcher* standard, while strict, does not require every congressional redistricting plan to achieve a deviation of zero unless justified. If it did, the second prong of the test would be superfluous. A reversal on this basis alone is warranted to clarify the appropriate standard for a one-person, one-vote challenge.

B. Plaintiffs' Burden Under the First Prong of the *Karcher* Test

The three-judge court concluded that Plaintiffs met their burden under the first prong of *Karcher*, which requires courts to consider whether the population

differences among districts "could have been reduced or eliminated altogether by a 'good-faith effort to draw districts of equal population.'" 195 F.Supp.2d at 675 (quoting *Karcher*, 462 U.S. at 730); App. at 7a. The court reached this conclusion on the basis of an abstract, hypothetical plan adduced by Plaintiffs. This plan was not considered by the state legislature and there is no record evidence that it would have had a chance of passage if it had been. As predicted by the dissenting Justices in *Karcher*, modern computer technology permits the creation of a multitude of plans with zero deviation. However, in the abstract, any such plan is no more than an exercise in aggregating population units. Accepting an abstract plan as meeting the first prong of *Karcher*, as was done here, reduces a plaintiff's burden to a simple exercise in transferring the results of long division onto a map.

A review of *Karcher* and subsequent lower court decisions interpreting it reveals no instance where an abstract zero deviation plan was sufficient in itself to satisfy the first prong of the test. Plaintiffs in those cases demonstrated either that a plan before the legislature had a lower population deviation than the enacted plan or that the proffered zero-deviation plan is itself a good-faith, feasible proposal with a realistic chance of enactment – i.e., that it tracks the constitutionally permissible political goals of the legislature as much as possible while obtaining zero deviation. In *Karcher*, this Court noted that "several other plans introduced in the 200th Legislature had smaller maximum deviations than the [enacted] Feldman Plan." 462 U.S. at 738. In response to an objection that "the alternative plans considered by the District Court [i.e., the other plans before the Legislature] were not comparable to the Feldman Plan because their political characters differed profoundly," this Court responded:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, ... in which the State bears the burden of justifying the differences with particularity.
>
> In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, 'resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality.' 394 U.S. [] at 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, ... one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another.... Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

Id. at 739-740

In *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), the three-judge court (which ultimately found the deviation justified and upheld the constitutionality of the plan under review) summarily concluded that because there was a plan before the legislature "with a smaller numerical deviation from absolute equality [total deviation of 10 people], plaintiffs have proved that [the enacted plan's] deviations did not result from an unavoidable good faith effort to achieve population equality." *Id.* at 396.[6]

Applying *Karcher* to require a plaintiff to do more than just offer a *tabula rasa* plan will simultaneously promote legislative attention to constitutional goals and discourage the extra-legislative creation of abstract plans for use as a wedge to open the courtroom door to litigation by political opponents. It will also assure that, if a case arises in which private plaintiffs genuinely care about population deviation rather than about partisan politics, they can obtain a remedy to meet their stated interests, without dragging the courts into political debate. The present appeal offers this Court the opportunity to clarify plaintiffs' burden under the first prong of *Karcher* as it

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[6] *See also Stone v. Hechler*, 782 F. Supp. 1116, 1126 (W.D. W.Va. 1992) ("Under *Karcher*, plaintiffs satisfy their burden under the first prong if they demonstrate that the population deviations among the congressional districts under West Va. Code §1-2-3 [the duly-enacted plan] could have been reduced or eliminated *by the adoption of a different plan that was before the Legislature when it enacted West Va. Code §1-2-3*. Because seventeen other plans with a lower overall variance were before the Legislature during its regular and special session, the Court concludes that Stone has satisfied his burden") (emphasis added).

coexists with long-standing precedent recognizing that redistricting is inherently a legislative process.

C. Justification Under Prong Two of *Karcher*

Under the second prong of the *Karcher* test (reached only if the plaintiff meets the burden under the first prong), a defendant must prove "that each significant variance between districts was necessary to achieve some legitimate goal." 462 U.S. at 731. This Court has explained that it will defer to state legislative policies, even if they result in a deviation from the one-person, one-vote standard –

> so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. See 412 U.S. at 795-797; cf. Upham v. Seamon, 456 U.S. 37 (1982); Connor v. Finch, 431 U.S. 407, 414-415 (1977). Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, see Gomillion v. Lightfoot, 364 U.S. 339 (1960), these are all legitimate objectives that on a proper showing could justify minor population deviations.

Karcher, 462 U.S. at 740.

In *Anne Arundel County*, on a record similar to the present case, a three-judge court concluded that the State had justified the 10-person total deviation (0.002%):

> [T]he State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10. These include: (1) keeping intact the three major regions that surround the center of the state ..., (2) creating a minority voting district, and (3) recognizing incumbent representation with its attendant seniority, in the House of Representatives. ... We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, §2 is, therefore, satisfied.

781 F. Supp. at 387. This Court affirmed. *See* 504 U.S. 938.

Here, the three-judge court concluded (Judge Yohn dissenting) that Defendants failed to justify the 19-person deviation. It rejected as "pretext" Defendants' justification of minimizing the number of split precincts and ignored the other justifications inherent in the Act and its legislative history because they did not deal with the issue of population deviation. 195 F.Supp.2d. at 677 & n.4; App. 11a-12a. Instead, the court evaluated whether the plan paid attention to the examples of legislative policies this Court noted in *Karcher* would justify minor deviations and determined that it did far worse on these legislative policies

than any other plan before the court. *Id.* at 678; App. at 13a.

Permitting such an approach is inconsistent with *Karcher*, would render the second prong of *Karcher* meaningless and would make it virtually impossible for any legislatively-enacted plan to survive scrutiny. This appeal offers an opportunity for the Court to clarify the application of the justification prong so as to enable state legislatures to better perform their constitutional responsibility.

1. Split precincts

While the three-judge court "acknowledge[d] that the desire to avoid splitting precincts is a legitimate state interest which could justify a nineteen person deviation," it rejected it as a justification because "the evidence has demonstrated that it is possible to draw a congressional district map with zero deviation and no precinct splits." 195 F.Supp.2d at 677; App. at 11a-12a. In so doing the court, in effect, eliminated the second prong of *Karcher*. If a legitimate justification can be labeled "pretext" because it is possible to draw a zero deviation map that splits no voting precincts, then there can be no justification of a plan that will not be deemed pretext when a hypothetical "zeroed out" plan is presented.

Moreover, where a duly-enacted congressional redistricting plan is under attack solely on the basis of a minuscule deviation from zero population, then a legitimate justification cannot be rejected just because a totally different plan could be drawn that would achieve zero deviation without any precinct splits. To permit such ignores the reality of the political process, with its implicit compromises, that this Court has stressed is the preferred (and the constitutionally mandated) means of creating congressional districts. *See e.g., Gaffney v. Cummings*,

412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.").

The question of whether an acknowledged legitimate state policy – minimizing precinct splits – can be termed "pretext" and disregarded as justification for a miniscule population deviation is a significant and important issue for the state legislatures that are responsible for congressional redistricting. At least once every decade, they must evaluate the constitutionality of the districts in terms of compliance with the constitutional requirement of one-person, one-vote. Typically, adjustments are required. In redrawing the districts, state legislatures must make policy decisions and reach compromises. If those choices are constitutional, then they should be considered as a justification, not as a pretext. In this case the court essentially treated any potential justification as a pretext. State legislatures need to know whether legitimate state policy will be recognized as a justification for a minuscule deviation resulting from the political process of achieving agreement on a congressional redistricting plan.

2. Other justifications

Defendants identified, and supported with reference to testimony and the legislative history, three other legitimate justifications: (1) the maintenance of two majority-minority districts (Districts 1 & 2 in Philadelphia County); (2) protection of the senior member of Pennsylvania's congressional delegation (Congressman Murtha in District 12), and (3) creation of an open seat in acknowledgment of the population growth in a particular part of Pennsylvania (District 6). These justifications are "consistent with constitutional norms" and should have

been considered by the court. The first two are similar to those accepted in *Anne Arundel County*, a decision affirmed by this Court, and the third is a legitimate legislative policy. Record evidence shows they were items of importance to the General Assembly during its debates on congressional redistricting. They should have been considered as justification for the minuscule population deviation of the Act 1 plan.

Disregarding these justifications is inconsistent with the approach taken by the three-judge court in *Anne Arundel County*, where two of the justifications were specifically considered and found sufficient. These justifications also seem to be within the ambit of the "legitimate objectives" this Court offered as examples in *Karcher*. State legislatures are faced with contradictory decisions concerning the identification of "legitimate objectives" that would justify a minor population deviation. This Court should take the opportunity to clarify the assessment of the objectives that will justify minor population deviations.

D. Federal Court Authority to Order Submission of Revised Plan

Upon declaring Act 1 unconstitutional, the three-judge court ordered the Pennsylvania General Assembly to, "within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." 195 F.Supp.2d at 679; App. at 17a. This order was both procedurally and substantively improper. Allowing it to stand would permit disrespect of a sovereign body, charged directly by the United States Constitution with the responsibility of putting in place the districts from

which representatives to Congress from the Commonwealth of Pennsylvania are to be elected.

This is not a case where the court merely gave the legislature an opportunity to act within a reasonable time, before the court itself undertook remedial proceedings. Instead, the court's order essentially set aside whatever else may have been on the legislative calendar, made responding to the court the top priority and actually mandated lawmaking in conformity with its order. Issues of federalism are raised when a federal court directs a state legislature to exercise sovereign functions. *See New York v. United States*, 505 U.S. 144 (1992) (Congress may not commandeer State's legislative processes); *id.* at 161 ("'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations'") (quoting *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)).

The court's order also arrogated to the three-judge federal panel a power of review and "final approval" of a state statute. Statutes are presumed valid and constitutional. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (duly-enacted revised redistricting plan presumed valid until challenged and determined otherwise). In the states, as in the federal government, once a bill is duly enacted by a legislative body and presented to and signed by the chief executive, it typically becomes law and is effective without further review and approval.[7] These

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[7] The Pennsylvania Constitution requires the President of the Senate and the Speaker of the House (Appellants in this case) to sign a bill that has passed both houses and to present it to the Governor for his approval. PA. CONST. art. III, §8; art. IV, §15. Appellants are without power under the Pennsylvania Constitution to present a bill to a federal court for its final approval.

principles should apply no less to curative legislation that follows a judicial decision declaring an earlier enactment unconstitutional. State officials should not have to bear the burden of arguing for "final approval" by the federal judiciary of a statute that has not even been challenged by a plaintiff. *See Wise, supra*; *see also Younger v. Harris*, 401 U.S. 37, 52 (1971) ("power and duty of the judiciary to declare laws unconstitutional is ... derived from its responsibility for resolving concrete disputes brought before the courts for decision").

This appeal affords the Court an opportunity to clarify the important relationship between the federal courts and the state legislatures.

CONCLUSION

This appeal involves congressional redistricting, a function that the United States Constitution places directly in the discretion of state legislatures. It provides an opportunity for this Court to provide clarity in two areas of importance and significance – application of the one-person, one-vote principle and application of federalism principles. This Court should note probable jurisdiction and proceed to address the merits of the questions presented.

Respectfully submitted,

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